United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Original w/affidavit of mailing

74-1930

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1930

UNITED STATES OF AMERICA,

Appellee,

—*against*—

SERGIO POBLETE,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

EDWARD R. KORMAN,
Chief Assistant United States Attorney,
Of Counsel.

CHARLES E. CLAYMAN,
Assistant United States Attorney.
Of Counsel.

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Preliminary Statement

The appellant Sergio Poblete appeals from a judgment of the United States District Court for the Eastern District of New York (Weinstein, *J.*) entered July 8, 1974, following his plea of guilty on May 17, 1974 to a charge of distributing cocaine not in an original stamped package or from an original stamped package. Title 26, United States Code, Section 4704(a). Prior to entry of judgment, the appellant moved to dismiss the indictment on the grounds the district court lacked jurisdiction over him. The district court denied the motion after a hearing, and on July 8, 1974 sentenced the appellant to a five year term imprisonment. He is presently incarcerated.

At the hearing on this motion appellant moved orally to withdraw his plea of guilty. The district court denied this motion (App. 6-7), finding:[1]

[1] Page references in parenthesis preceded by "App." refer to pages in the Appellant's Appendix. Page references preceded by the letters "G.A." refer to pages in the Government's Appendix.

"There is no reason to permit the withdrawal of the plea. The inquiry made by the Court indicates that the defendant is guilty, and the only issue is whether the Court has jurisdiction. On that question I will hear you."

Statement of the Case

I. Background

On July 20, 1972 appellant Sergio Poblete was indicted by a Grand Jury empanelled in the Eastern District of New York. The appellant along with thirteen other defendants was charged with conspiracy to import large quantities of cocaine from and through Chile into the United States. (App. 12a) On the same day in which the indictment was returned, July 20, 1972, a warrant was issued which "commanded" any "Special Agent of the Bureau of Narcotics and Dangerous Drugs" and/or "any United States Marshal or any Deputy United States Marshal" to "arrest Sergio Poblete, and bring him forthwith before the United States District Court for the Eastern District of New York in the City of Brooklyn, New York to answer [the] indictment." (G.A. 1a)

On May 6, 1974, appellant, following his expulsion from Chile, was arraigned on the indictment and entered a plea of not guilty. On May 8, 1974, counsel for appellant stated in a pretrial conference before Judge Weinstein in the presence of the appellant, that "although the defendant had indicated he would plead guilty to the charge . . . the defendant has requested an adjournment Your Honor so that he may reflect a little bit more on what he wants to do." (G.A. 4a). An adjournment was granted until May 17, 1974 for this purpose.

On May 17, 1974, appellant's counsel advised Judge Weinstein that appellant was prepared to waive indictment and plead guilty to a superseding information charging him

with distributing cocaine not in an original stamped package. After a full inquiry by the district court, not challenged in this appeal, the appellant executed a waiver of indictment and after further inquiry he entered a plea of guilty to the superseding information. (G.A. 7a-10a). Sentence was adjourned without date in order that the United States Attorney could fully apprise the district court of appellant's cooperation.

II. The Motion to Dismiss the Indictment

On July 5, 1974, appellant's counsel filed a motion to dismiss the indictment pursuant to Rule 12(b)(2) of the Federal Rules of Criminal Procedure "for lack of jurisdiction over the person". Appellant's attorney contended that at the time of entry of the plea (May 17, 1974) he was unaware of *United States* v. *Toscanino*, 500 F.2d 267 (C.A. 1974), *petition for rehearing en banc denied*, 504 F.2d 1380 1974), which had been decided only two days earlier on May 15, 1974. Appellant's attorney further stated that on May 29, 1974, twelve days after the entry of the plea, he spoke to the appellant and the appellant related to him an account of his arrest and interrogation in Chile, which appellant put in writing and attached to the motion papers (G.A. 11a-12a). In this statement, which was apparently omitted inadvertently from the Appendix, appellant claimed to have been arrested on November 13, 1973, "by F.B.I. agents following a request made by the United States." Appellant then went on to allege that he was subsequently taken to another city (Santiago)--he did not say by whom—where he claimed to have been tortured for thirty-seven days; that he was then transferred "to a concentration camp", the Chile Stadium, where he was kept from December 4, 1973 until May 4, 1974, when he was flown to the United States (G.A. 11a).

On July 8, 1974 Judge Weinstein stated "[that] in view of the motion I think we ought to hold a hearing forthwith.

Are you prepared to go forward with a hearing?" Mr. Kelly responded "I am." (App. 3). Although the Assistant United States Attorney handling the matter was on trial in another court, and although the United States protested that it had been given only two days notice, the hearing was ordered and the district court agreed to grant the United States an adjournment, if this proved necessary. Appellant was the only witness and testified as follows. He was a fifty three year old citizen of Calbuco, Chile with a criminal record. In November of 1973 he left Santiago, Chile and went to Annergusto, Chile because the military junta had taken power and they were arresting everybody with a criminal record. On November 13, 1973 he was arrested (App. 6). Contrary to the statement appended to his motion to dismiss the indictment, that he was arrested by "F.B.I. agents", appellant testified under oath that he was arrested by "the police" (App. 17). Appellant likewise failed to repeat the allegation that this arrest "followed a request made by the United States", instead he merely claimed to have been told that he was arrested because of "an order by the United States" (App. 17). Moreover, when asked by his own lawyer whether "any Americans were involved in your interrogations or mistreatments," he responded, "I cannot tell you" . . . "I cannot tell you for sure that there were Americans involved, but I do know there were Americans around in the Department of Narcotics down there" (App. 21). On cross-examination, appellant stated that on May 4, 1974, he was taken by the Chilean authorities, with five other prisoners, to the airport (App. 28-30):

> Q. Mr. Poblete, you mentioned on your direct examination there came a time when you were taken from the airport in Santiago, Chile; is that correct? A. Yes.
>
> Q. When you arrived at the airport, do you recall who was present, when you arrived? A. We were

taken there by policemen dressed up as civilians and when we got aboard the plane there was a Mr. Cecile and somebody else, Mr. Frunguli, and there was also a Captain Maica of the Chilean police. And there was a Mr. Martin, he is from Investigation.

Q. Now, had you seen Mr. Cecile before you boarded the plane? A. No.

Q. Had you seen Mr. Frunguli before you boarded the aircraft? A. No.

Q. Then when you got on the aircraft, where did you sit? A. I was handcuffed to Daved, a man named Daved, and we both sat together in the plane, Jorgi Daved.

* * * * *

Q. Now, when you were on the aircraft, were you provided with food and other liquors, were you allowed to eat? A. Yes, we received food.

Q. Were you allowed to go to the bathroom on the airplane? A. Well, I didn't go to the bathroom myself but other prisoners who were with me, I remember they did go.

* * * * *

Q. Now, at the time you were travelling on this aircraft from I believe you said Santiago, Chile, to Lima, Peru, were you at any time tortured? A. No.

Q. At any time as you travelled from Lima, Peru, ultimately to the United States on board this aircraft, were you tortured? A. No.

Q. When you got on the airplane as you earlier stated, this was the first time that you saw these American agents, Mr. Cecile and Frunguli; is that correct? A. Well, when we got into the plane they were there, yes.

After appellant's testimony, his lawyer requested that he be permitted to call one Ivan Fisher, a private attorney, to testify as to the difficulty of defense counsel getting adequate information in South America relative to the

allegations which Mr. Kelly had bought. The United States objected and this request was denied. Mr. Kelly had coupled his request to call Mr. Fisher as a witness, with the following statement (App. 31):

> "[I]t is very difficult for a defendant's counsel in going to South America to try to get the complete cooperation of the officials there with respect to the investigation, and I wouldn't say this is a Brady situation, but it is analogous to a Brady situation in that I think it is most difficult for a defendant to produce any witnesses because of the difficulties defense counsel run into in trying to obtain them. So it is really incumbent on the United States to bring forth information which is peculiarly within their control in order to meet the allegations of the defendant."

In response to counsel's request the district court posed the following question to Assistant United States Attorney Bernard J. Fried (App. 32):

> "Does the Government have any information that the United States agents participated in the torture of this defendant, assuming he was tortured."

Mr. Fried made the following response to defense counsel's request for Brady material and the Court's question (App. 32-33):

> "The Government has no information of that kind whatsoever, Your Honor, in fact I might say, for purposes of the record, that I returned last night—rather yesterday afternoon, it was a business trip to Chile and Argentina in connection with—not with this case but with another case, *United States* versus *Baeza*, and I am aware—I was aware of the expulsion of this defendant at the same time that the other

five defendants who were reported in the newspaper article, and Carlos Baeza was one of those defendants, and while I was away in Chile I inquired into the circumstances of the expulsions and whether the American authorities, the American agents down there participated, and I was informed that the American authorities did not aid or procure [or] counsel for [sic] any of the expulsions that are alleged to have occurred in this case." [1]

III. Findings

At the conclusion of the defendant's presentation the district court found that (App. 35): "Taking the defendant's testimony at full value, this court does have jurisdiction." The district court continued its findings as follows (App. 35-36):

> There seems to be no doubt that for some years the Government of the United States has sought the cooperation of the Government of Chile in obtaining the extradition under Chilean laws of a number of those who have been indicted and convicted, and in one case at least of various drug crimes.
>
> There is no evidence that the United States Government participated in any illegal activities in Chile or in this country in connection with the expulsion of the defendant. He was known to the police of Chile as a habitual criminal and one who has been indicted in this country in a legal and lawful manner.
>
> It was not inappropriate under the circumstances for this Government to request the cooperation of

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[1] This statement concededly is somewhat garbled in transcription. Mr. Fried indicated that the American Agents did not participate in the arrest or interrogation of the appellant; in no way did he mean to imply that the United States did not request the expulsion of the appellant.

the Chilean Government in obtaining the extradition of this defendant.

This Court has no power to inquire into the operations of the Chilean laws and the nature of their extradition or expulsion procedures.

Upon delivery of the defendant to the American agents, according to the law of Chile, so far as can be determined by this court, he was transported upon the basis of an arrest warrant issued in this court following indictment.

That indictment, so far as this court can determine is valid.

He was transported by what the court can take judicial notice to be was a normal, civilian airline, Braniff Airline, on a regularly scheduled flight to this country.

He was not interrogated nor treated improperly by any American agent once they obtained custody.

Under the circumstances, the Court does not believe that the Toscanino case has any application.

The exercise of this court's jurisdiction, therefore, was proper.[3]

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[3] During the course of the hearing the district court took judicial notice of the fact that during the overthrow of Salvador Allende there were widespread arrests and extensive torture as a routine and regular practice instituted by the regime and not at the request of the United States (App. 26).

ARGUMENT

Appellant's claims are insufficient to warrant any relief and were waived by his plea of guilty.

1. The gist of appellant's allegations—at least those made under oath—was that he was arrested by Chilean police, held for a substantial period of time by Chilean authorities, and tortured by them during a portion of that period. There is no allegation that any agents of the Drug Enforcement Administration were present or participated in his arrest or custodial interrogation until he was placed on a plane destined for the United States—a trip during which he was treated in a perfectly proper manner. This case is in stark contrast to the allegations in *United States* v. *Toscanino*, 500 F.2d 267 (C.A. 2) *petition for rehearing en banc denied*, 504 F.2d 1380 (1974), where it was alleged that the defendant, prior to his flight to the United States, was arrested and mistreated by Americans or those paid by them. Here appellant admitted he was arrested by local police, who were rounding up all persons with prior criminal records, and that his only contact with Americans came during his plane flight to the United States. Moreover, it is conceded that, unlike *United States* v. *Toscanino*, *supra*, appellant was expelled from Chile by formal action of the Chilean government. While appellant claims to have been "told" that his initial arrest was pursuant to "an order by the United States" (App. 18), that allegation would not by itself entitle him to any relief. The United States is clearly free to ask a foreign government to arrest and deport or expel one of its nationals to the United States. *Lujan* v. *Gengler*, — F.2d —, No. 74-2084 (C.A. 2, January 8, 1975).

Although we thus submit that the allegations made by the appellant under oath are patently inadequate to entitle him to any relief under the holding in *United States* v. *Toscanino*, *supra*, even as it stood before it was undermined and distinguished by subsequent holdings (see *Gerstein* v.

Pugh, — U.S. —, 43 U.S. Law Week 4230, 4235 (February 18, 1975), reaffirming the prior holdings of *Frisbie* v. *Collins*, 342 U.S. 519 (1952) and *Ker* v. *Illinois*, 119 U.S. 436 (1886); *Lujan* v. *Gengler*, *supra*, limiting *United States* v. *Toscanino*, *supra*, to its peculiar facts [Slip op. 1205],[4] the threshold issue here is whether the claim may be raised for the first time after a plea of guilty. We submit that it may not be so raised.

2. In *United States* v. *Doyle*, 348 F.2d 715, 718-719 (C.A. 2, 1965), *cert. denied*, 382 U.S. 843 (1965), this Court held that "(a)n unqualified plea of guilty, legitimately obtained and still in force, bars further consideration of all but most fundamental premises for the conviction, of which subject-matter jurisdiction of the court is the most familiar example." This principle was recently reaffirmed in *Lefkowitz* v. *Newsome*, — U.S. —, 43 U.S. Law Week 4284, 4286 (February 19, 1975), where the Supreme Court observed:

> "The *Brady* trilogy[5] announced the general rule that a guilty plea, intelligently and voluntarily made, bars the later assertion of consitutional challenges to the pretrial proceedings. This principle was reaffirmed in *Tollett* v. *Henderson*, *supra*, at 267: 'When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea.'"

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[4] We continue to adhere to the position advanced in our petition for rehearing in *United States* v. *Toscanino*, *supra*, that that case—even as subsequently limited—was wrongly decided.

[5] *Brady* v. *United States*, 397 U.S. 742 (1971); *McMann* v. *Richardson*, 397 U.S. 759 (1970); *Parker* v. *North Carolina*, 397 U.S. 790 (1970).

Accordingly, it has been held repeatedly that claims directed to jurisdiction of the district court over the person of a defendant are deemed waived by a plea of guilty. *United States* v. *Rosenberg*, 195 F.2d 583 (C.A. 2, 1952), certiorari denied 344 U.S. 838; *Bistram* v. *United States*, 253 F.2d 610 (C.A. 8, 1958); *Hardy* v. *United States*, 250 F.2d 580 (C.A. 8, 1958), certiorari denied 357 U.S. 921; *Pon* v. *United States*, 168 F.2d 373 (C.A. 1, 1948); *United States* v. *Woodring*, 446 F.2d 733 (C.A. 10, 1971); *Sewell* v. *United States*, 406 F.2d 1289 (C.A. 8, 1969).

Moreover, since it is now plain under the *Brady* trilogy that had the appellant plead guilty because of a confession which had been beaten out of him, such a claim would not be entertained at this time (*McMann* v. *Richardson*, 397 U.S. 759); it follows, *a fortiorari*, that where as here, there is no "fruit" of the allegedly unlawful conduct, the guilty plea should be equally invulnerable to attack.

CONCLUSION

The judgment of conviction should be affirmed.

Dated: February 26, 1975.

Respectfully submitted,

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

EDWARD R. KORMAN,
Chief Assistant United States Attorney,
Of Counsel.

CHARLES E. CLAYMAN,
Assistant United States Attorney,
Of Counsel.

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
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EVELYN COHEN, being duly sworn, says that on the 27th day of February, 1975, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a Brief for Appellee of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Roy L. Reardon, Esq.
One Battery Park Plaza
New York, New York 10004

Evelyn Cohen

Sworn to before me this
27th day of Feb. 1975

Olga S. Morgan

OLGA S. MORGAN
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No. 24-7501966
Qualified in Kings County
Commission Expires March 30, 19 77